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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
The Development of a National Framework	)	RM 9474
to Detect and Deter Backsliding to Ensure	)	
Continued Bell Operating Company	)	
Compliance with Section 271 of the	)	
Communications Act Once In-Region	)	
InterLATA Relief Is Obtained	)	

REPLY COMMENTS OF BELL ATLANTIC[1]

The vast majority of comments filed by competitive local exchange carriers (CLECs) in this proceeding echo the arguments made by Allegiance in its Petition for Expedited Rulemaking. Bell Atlantic already has demonstrated that those arguments are fundamentally flawed, and that Allegiance's Petition should be denied.[2] Below, Bell Atlantic addresses a few issues raised in the comments that require further discussion.

I. The Commission Should Not Pre-Judge Future Section 271 Applications.

Several commenters assert that the Commission should decide now to impose conditions on any section 271 application it grants. *E.g.,* Pac West Comments at 4; RCN Comments at 4 (arguing that the Commission should institute a new proceeding to develop performance measures, standards and remedies and should impose the

[1] The Bell Atlantic telephone companies (Bell Atlantic) are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

[2] Bell Atlantic's Opposition to Petition for Expedited Rulemaking, filed March 8, 1999.

"backsliding measures" developed there as conditions on any Section 271 authorization). *See also,* GST Comments at 11 (arguing that the Commission should "simply adopt a rule requiring that it impose significant and substantial conditions on each grant of authority to provide in-region InterLATA service"). A blanket rule requiring the Commission to impose specific conditions on every grant of section 271 authority – or a rule requiring the Commission to impose some conditions, even if unspecified – cannot possibly take into account the particular facts of each section 271 application that will be presented to the Commission. As a result, it would be arbitrary and unreasonable for the Commission to decide, in advance, the outcome of its review of future section 271 applications.

The Commission has acknowledged as much. In its order rejecting BellSouth's second application for Louisiana, the Commission noted, in discussing the performance measures adopted by the Louisiana Public Service Commission, that "the presence or absence of any one factor would not dictate the outcome of the public interest inquiry," and it "stress[ed] that such factors are not preconditions to BOC entry into the in-region, interLATA market."[3]

II. The Commission Should Reject Suggestions That It Adopt Illegal Rules.

A number of commenters suggest variations on Allegiance's proposals that would simply exacerbate the illegality that Bell Atlantic pointed out in its initial comments.[4] For example, GST argues that "the price reduction phase of Allegiance's penalty scheme

[3] *Application of BellSouth for Provision of In-Region, InterLATA Services in Louisiana,* 13 FCC Rcd 20599 at ¶ 362 and n. 1136 (1998).

[4] As Bell Atlantic explained in its Opposition, many of Allegiance's proposals could not be adopted without amending the 1996 Act. Opposition at 1-4.

should be limited to 30 to 45 days." GST Comments at 10. As Bell Atlantic explained, a 60-day time frame is, as a practical matter, unworkable; the shorter time frame proposed by GST would result in imposition of tier 2 penalties before the next report of performance is available. *See* Bell Atlantic Opposition at 2-3. GST also urges the Commission to add a "fourth tier of penalties" – revocation of section 271 authority, GST Comments at 10 – but like Allegiance fails to reflect the Act's notice and hearing requirement.

The Competition Policy Institute (CPI) argues that the Commission "may want to consider inviting the states to periodically re-certify compliance with the competitive checklist as part of the Commission's enforcement regime." CPI Comments at 9. There is no provision in the Act for any sort of a "re-certification" requirement following approval of a section 271 application, and the Commission should not invent any such extra-statutory procedure.

Finally, WinStar argues that the Commission should create a default remedy in case section 271 complaints are not resolved within 90 days. According to WinStar, "absent resolution or a final order with [sic] 90 days, the 271 authority of the BOC should be suspended indefinitely pending Commission findings that no backsliding has occurred." WinStar Comments at 9-10. It is hard to imagine a rule that would constitute a more severe denial of due process than WinStar's proposal, which would expressly impose a penalty during the pendency of a proceeding to determine whether or not a violation has occurred. The Commission should reject the suggestions of commenters to establish rules that are illegal.

III. The Commission Should Reject Attempts Of Commenters To Use This Forum To Reargue Issues From Other Proceedings.

AT&T and MCI WorldCom agree with Bell Atlantic that there is no need for the Commission to establish yet another complaint procedure to handle section 271 complaints. *See* AT&T Comments at 10, n. 17; MCI WorldCom Comments at 19-20. They further agree that there is no need to institute a new rulemaking since the issues raised by Allegiance are already the subject of pending Commission proceedings. *See* AT&T Comments at 4-6; MCI WorldCom Comments at ii, 1. Both AT&T and MCI WorldCom nevertheless spend significant portions of their comments rearguing issues pending in the other Commission proceedings or before state commissions. Bell Atlantic has addressed or is addressing AT&T's and MCI WorldCom's arguments in the appropriate proceedings,[5] and will not repeat all of those discussions here. A few points, however, require response.

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[5] For example, AT&T claims that Bell Atlantic has not complied with the commitments imposed as conditions of the approval of its merger with NYNEX. AT&T Comments at 3, n. 5. Bell Atlantic has filed a report demonstrating that it has fully complied with all the conditions, and will respond in the Commission's proceeding addressing that report to specific comments raised there.

Similarly, MCI WorldCom argues that KPMG – a consultant hired by the New York Public Service Commission to conduct a thorough review of Bell Atlantic's operating support systems and the access to them provided to CLECs – found "stark discrepancies" between Bell Atlantic's definitions of particular metrics and CLECs' expectations. MCI WorldCom Comments at 8. As the New York Department of Public Service explains, the New York metrics and standards "were developed in a collaborative process with Bell Atlantic-New York and a number of its competitors" with oversight from the New York Public Service Commission. NYDPS Comments at 2, n. 2. Moreover, none of the "exceptions" KPMG has posted on the New York Commission's web site reflects the "stark discrepancies" alleged by MCI WorldCom. In any event, Bell Atlantic has responded to the issues noted by KPMG, and the outcome of KPMG's review is the subject of an extensive and pending proceeding before the New York Public Service Commission.

MCI WorldCom reiterates its claim that the Commission should establish "objective" standards for all performance measures. According to MCI WorldCom, incumbent LECs would then have to provide service to CLECs at parity with the service provided to their own retail customers or at the objective standard, whichever is better. MCI WorldCom Comments at 12-14. The Eighth Circuit has made clear that incumbent LECs are not required to provide better service to CLECs than they are to their own customers. *Iowa Utilities Board v. FCC*, 120 F.2d 753, 812-13 (8th Cir. 1997).[6]

In the face of this clear ruling, however, MCI WorldCom claims that it is entitled to objective standards because it "cannot commit an interval to a customer or enter into a service level agreement if parity for a key input is seven days one month, twenty the next and five the next." MCI WorldCom Comments at 14. MCI WorldCom's argument is a red herring. MCI WorldCom does not determine the interval for services with retail analogs by looking at the average completion interval for the previous month. Instead, MCI WorldCom's customer service representatives have access to the same appointment clock or due date calendar that Bell Atlantic's service representatives use to determine when service can be provided to the customer. If an MCI WorldCom service representative and a Bell Atlantic service representative are talking at the same time to customers served by the same central office and purchasing the same service(s), they will be offered the same appointment intervals through the pre-order interface. As a result, MCI WorldCom is "just as able as the BOC to tell customers what to expect in terms of

[6] This aspect of the Eighth Circuit's opinion was not appealed to the Supreme Court, and therefore was not affected by the Supreme Court's decision in *AT&T v. Iowa Utilities Board,* 119 S.Ct. 721 (1999).

service delivery," MCI WorldCom Comments at 14, and an "objective" standard is unnecessary.

MCI WorldCom also argues that the Commission should establish remedies for failure to meet performance standards. According to MCI WorldCom, "neither [New York nor Texas] has adopted an adequate remedy mechanism to prevent backsliding." MCI WorldCom Comments at 14. MCI WorldCom's allegations are directly contradicted by the comments of the New York Department of Public Service (NYDPS). The New York Public Service Commission "has established comprehensive carrier to carrier performance measurements, standards and reporting guidelines" and is developing self-executing enforcement mechanisms to ensure compliance with those standards, including market adjustments of up to $150,000,000 annually in the event that Bell Atlantic-New York's performance decreases. NYDPS Comments at 2 and n. 3. Accordingly, NYDPS "will have an enforceable backsliding framework in place in connection with Bell Atlantic-New York's 271 application." NYDPS Comments at 1-2 (emphasis in original). MCI WorldCom should not be permitted to relitigate here issues decided against it in other forums.

AT&T presents an extensive discussion of a remedy scheme, even though it argues that proposal should be addressed in a different proceeding. AT&T Comments at 6-8 and Attachment A. Although AT&T's scheme has a veneer of statistical respectability, it is deeply flawed because it completely fails to take into account whether the performance "miss" produced by its statistical methodology has any competitive

significance.[7] Moreover, proposals that penalize incumbent more LECs more heavily as z-scores get worse – based on a claim that this penalizes worse performance more severely – in fact would favor larger CLECs at the expense of smaller CLECs. Where performance for two CLECs is identical (for example, the same percentage of missed appointments), the z-score will be worse for a large CLEC than for a small one based only on the difference in "sample sizes" – the number of observations on which the performance score is based. As a result, if the level of remedy payable to a CLEC increases as the z-score gets "worse," a large CLEC would receive proportionally more than a smaller CLEC, even if performance is identical. The Commission should not adopt a system rigged in favor of large CLECs at the expense of smaller competitors.

AT&T also argues that the Commission should complete a proceeding on performance measures and remedies "before it grants any petitions under Section 271." AT&T Comments at 10. The Commission should reject this blatant ploy to delay further the day when AT&T and the rest of the long distance oligopoly face true competition.[8]

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[7] MCI WorldCom also places more weight on statistical methods than is appropriate. MCI WorldCom claims that use of the "modified z-test" can account for variability such as "more CLEC orders [being] placed during a storm or high workload period or . . . for services involving shorter intervals." MCI WorldCom Comments at 12, n. 16. This is simply not the case. The modified z-test can address differences in sample size, but it provides no way to account for all of the variations suggested by MCI WorldCom. As a result, statistical methodologies flag measures (and the performance being measured) that require closer examination, but they do not, on their own, provide information concerning competitive significance or underlying causes or even severity of the performance "miss."

[8] CPI argues that local competition is "the only condition that ensures the BOCs will pass through in consumer prices the gains achieved by their entry into the long distance market." CPI Comments at 2. In fact, CPI has it exactly backwards. Consumers currently pay supra-competitive prices for long distance service because the long distance company oligopoly does not face real competition. Moreover, they have

CONCLUSION

The Commission should decline commenters' invitations to pre-judge future section 271 applications or to establish rules that would be illegal. In addition, the Commission should reject attempts to use this forum to argue issues that are pending in other proceedings. There is no need to undertake a new rulemaking now. Accordingly, Allegiance's Petition should be denied.

Respectfully submitted,

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delayed entering the local exchange market because local service is not as profitable as long distance and they are fearful that their presence in the local market would lead to approval of Bell company 271 applications, thereby jeopardizing their lucrative long distance profits. If Bell companies are permitted to provide in-region long distance service, however, the long distance companies will have to enter the local market to have a competitive service offering, and true competition in all telecommunications markets will finally emerge.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 1999, copies of the foregoing "Reply Comments of Bell Atlantic" were sent by first class mail, postage prepaid, to the parties on the attached list.

Jennifer L. Hoh

* Via hand delivery.

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